STATEMENT BY

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BEFORE

THE SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION

HOUSE COMMITTEE ON GOVERNMENT REFORM

ON

ESTABLISHING A FEDERAL EMPLOYEES APPEALS COMMISSION

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Mr. Chairman and members of the Subcommittee, my name is John Gage and I am the National President of the American Federation of Government Employees, AFL-CIO. On behalf of the 600,000 employees represented by AFGE, I want to thank you for the opportunity to submit our views on the issue of creating a Commission to study streamlining employee appeals.

The proposed Commission would be charged with studying and proposing revisions to the current Federal employees grievance and appeals system, including charges, cases and appeals now investigated by, litigated by and/or decided by the Merit Systems Protection Board ("MSPB"), the Federal Labor Relations Authority ("FLRA"), the Equal Employment Opportunity Commission ("EEOC"), and the Office of Special Counsel ("OSC"), respectively. It would be made up of six political appointees (the directors of each affected agency, the Office of Personnel Management ("OPM"), and the Federal Mediation and Conciliation Service ("FMCS"), two representatives of supervisors and managers and two union representatives. It would be charged with four main duties:

1) identifying overlaps between the jurisdiction of these four agencies,

2) comparing the average processing times of the various types of cases and agencies,

3) identifying impediments to the fair and timely investigation or adjudication of such cases, and

4) presenting recommendations for improvement in seven specific areas, to include possible consolidation of agencies, and/or organizational, procedural, or other changes in order to improve the efficiency, effectiveness, and fairness of their appeals system.

AFGE CANNOT SUPPORT THE COMMISSION AS PROPOSED.

It seems to us that any employee-oriented organization, regardless of its particular constituency, should be supportive of the broad, general goal of improving employee appeals. This is particularly true in the federal sector, where a fired employee is off the payroll and out the door and a suspended employee is forced to serve a suspension long before the appeals process runs its course. In this context, it is clearly in everyone's interest to have a fair, straightforward, and expeditious appeal process that does not consume the limited resources of the employee, the agency, and the taxpayer in years of expensive litigation. Streamlining the employee appeals process is a laudable goal for this subcommittee, and AFGE and its members would welcome certain improvements in the federal employees appeal system.

However, we cannot support the Commission as proposed. It is too large, has too broad a mandate, would take too long to deliberate over unnecessary recommendations, and would lack any real credibility because its make-up is too heavily weighted in favor of political appointees.

For example, our experience with the A-76 Commission in 2001-02, was not a positive one. There, the Commission was used as an excuse against undertaking legislative efforts to reform the OMB privatization agenda, while at the same time, the administration was proceeding full speed ahead with its privatization plans. Spending time "studying" and "recommending" proposals

when the administration has already embarked on a different course of action simply wastes everyone's time.

Another concern is whether the commission would be required to reach consensus or otherwise respect the views of the minority, for example by including a minority report or dissenting views in addition to the main recommendations. All too often, such Commissions, like the recent Social Security Reform Commission and Tax Reform Commission, are stacked with administration officials with pre-determined viewpoints. Such bodies result in an enormous waste of time and taxpayer dollars, since they invariably end up simply rubber-stamping the proposals of the majority.

AFGE RECOMMENDS INSTEAD THAT ANY BILL BE NARROWLY TAILORED TO FOCUS ON CRITICAL IMPROVEMENTS TO THE EEOC AND MIXED CASE PROCESSES.

Despite our opposition to the Commission as currently proposed, we appreciate the Subcommittee's expressed willingness to act in this area, and certainly believe there is room for improvement in three of the areas identified in the proposed bill. These are:

A. adequately funding the EEOC to reduce its huge case backlogs, both federal sector and private sector;

B. improving the EEOC investigative process, which presently takes much too long and involves a built-in conflict of interest, and

C. reforming appeals of "mixed cases," or those cases which involve two elements: adverse actions, along with allegations of discrimination or other prohibited personnel practices, and currently have to be heard in at least two separate administrative agencies and two separate courts.

I will discuss each of these problems briefly, and suggest ways to fix them which do not require any additional study, and which would be cheaper, easier,

more fair, and better for all involved: employees, employing agencies, and taxpayers. If a Commission is to be established, its charge should be limited to these three issues.

A. The EEOC must be adequately funded in order to reduce its huge backlogs, both in federal sector case processing and federal sector appeals, as well as in the private sector.

AFGE is very concerned about the crisis in staffing and funding which has developed in recent years at the EEOC. As you well know, the EEOC is the nation's discrimination watchdog, tasked with protecting employees and job applicants from illegal discrimination and harassment, both by federal government employers and by private sector employers. Since 2001, the Bush administration has imposed budget cuts and hiring freezes that have crippled the agency, increased backlogs, and made it very difficult for it to carry out its mission by investigating cases and resolving appeals in a timely manner. For every victim of discrimination caught in this backlog, justice delayed is justice denied.

The EEOC is experiencing significant staff attrition and has a backlog of cases numbering in the tens of thousands. The agency's own budget projections estimate that its backlog of private sector discrimination charges will rise from 33,562 in fiscal 2005 to nearly 48,000 in fiscal year 2007. Despite this growing backlog, the agency has already lost 20 percent of its workforce, and has been

unable to replace experienced investigators, lawyers, paralegal and clerical staff because of a hiring freeze in effect since 2001.

Despite the EEOC's glaring need for additional staff and other resources, the administration has proposed cutting its budget for next year by an additional $4 million over the already inadequate level. To add insult to injury, the agency itself is spending its limited funds on a privatized call center and a reorganization plan which has downgraded local offices and reduced staff, which could further slow down case processing. These changes would weaken access to the EEOC for thousands of federal employees who suffer discrimination every year, and should be reversed.

In addition, the proposed personnel changes for the Departments of Defense and Homeland Security are likely to lead to a dramatic increase in EEOC charges filed by federal sector employees over the next few years, as more and more employees challenge the new "performance payouts" proposed by the two departments.

Given its reduced budget and exodus of experienced workers to retirement, we fear that the EEOC will be unable to reduce its backlog of discrimination cases. The cause of the backlog is simple: without proper funding to hire badly needed staff members, the agency cannot schedule hearings in discrimination cases, Administrative Judges cannot issue decisions, and federal employee appeals cannot be resolved, meaning many cases must languish for years and millions of federal employees are left unprotected.

The remedy for the backlog is also simple: provide the EEOC with adequate funding so that it can hire the additional staff needed to process its federal sector discrimination cases in a timely manner. All federal employees are entitled to a prompt, full and fair hearing of their discrimination claims, especially at a time when the workforce is aging rapidly and both disability and sexual harassment claims continue to increase. Any available funding should be put directly into the EEOC's budget and earmarked for reducing case backlogs, rather than used to fund more studies.

B. AFGE does support transferring authority for EEO investigations from employing agencies to a central, independent agency (the EEOC itself), as long as sufficient funding is provided to support the transfer and hire the necessary investigators.

AFGE agrees with the Committee's suggestion that it would be more efficient to have a central, independent agency (the EEOC itself), conduct the initial investigation of EEO complaints against federal agencies, as long as sufficient funding is provided to support the transfer and hire the necessary investigators.

Allowing agencies to investigate their own EEO charges as they do now takes much too long and presents an inherent conflict of interest. Although federal regulations require that such investigations be completed within 180 days, agencies took an average of 280 days in FY 2004 and 237 days in FY 2005. Overall, the average processing time for closing complaints at the agency level was 469 days in FY 2004, and 411 days in FY 2004.

AFGE would support a proposal to remove the authority to investigate EEOC charges from the employing agencies, and transfer this function to the EEOC itself. However, Congress would have to allocate substantial funding to go along with this substantial workload, so that the EEOC could hire adequate staff (or arrange for details or transfers of EEO investigators from the various agencies to the new central office or regional offices). The goal of the transition would be to complete all investigations within the statutory mandate of 180 days. Such a reform could significantly improve both the quality, timeliness and the perceived credibility of the federal employee investigation process, and could lead to better decision-making and fewer hearings in the long run. However, the already-overburdened EEOC should not be reassigned this responsibility without ensuring adequate funding. That would be worse than the status quo.

C. The overlapping jurisdictions and double exhaustion requirements for mixed cases should be abolished.

The most pressing task for this committee, or for a Commission if one is to be created, should be to reform the cumbersome and duplicative appeal process for "mixed cases" which involve two separate causes of action: an adverse action coupled with allegations of discrimination or other prohibited personnel practices, or violations of *both* a collective bargaining agreement and law. Under current rules, such cases have to be heard in at least two separate administrative agencies and two separate courts.

While we admit there is room for some improvement in the present system, AFGE cannot support any Commission charged with merging the MSPB, EEOC,

FLRA, and/or OSC into a single “superagency,” nor do we believe that any changes to the collectively bargained grievance and arbitration process are needed at this time. For the last 25 years, since the passage of the Civil Service Reform Act (“CSRA”) and the establishment of the federal employee appeals system, there has been a clear, significant, and valid jurisdictional distinction between the cases heard by these separate agencies. The MSPB hears individual employee appeals from agency personnel actions. Employees have the right to appeal to the Board if they are removed, demoted or suspended for misconduct or poor performance, subject to certain Reductions in Force (RIF) actions, or denied retirement or certain insurance benefits. The EEOC hears only cases involving discrimination on the basis of race, color, sex, national origin, religion, age or handicap. OSC investigates and sometimes prosecutes whistleblower cases, Uniformed Services, Hatch Act, and other very specialized cases.

In contrast, the FLRA, unlike these other agencies, is not a "personnel" agency. The FLRA handles representation issues and labor-management disputes between agencies and unions (and between unions and employees, or other unions), not disputes between employees and their employing agencies. Like the National Labor Relations Board in the private sector, the FLRA has specialized expertise in complex bargaining issues, unit representation issues, negotiations, labor unions, review of arbitration awards, and cooperative labor-relations programs. No other federal agency has the experience or capacity to handle such labor-management matters.

The solution to the problems identified in the government's employee appeals processes is not to merge these five highly dissimilar agencies into a single “super-agency.” Instead, the real challenge is to cut down on the number of

multiple forums or steps that employees can or, in some cases must, avail themselves of in attempting to process a single appeal to finality, especially the dreaded “mixed case” -- by definition, an appeal of an adverse action (or serious discipline) coupled with a claim that the agency action was motivated by discrimination. The simultaneous and overlapping jurisdiction of the EEOC and MSPB over these cases creates a situation where multiple steps are required to process some appeals.

For example, a "mixed" case can BEGIN with either an EEO charge, an MSPB appeal, or a grievance under the negotiated procedure. The problem, as we see it, occurs after the original forum issues its decision. Rather than being "bound" by a final decision of the selected administrative tribunal, employees may be forced to file a second appeal in another administrative tribunal, resulting in seemingly endless appeals.

Thus, when critics complain about the confusing and circuitous path that an employee appeal can take as it winds its way to a final decision, and the lengthy time such appeals may take, they are normally addressing “mixed cases.” These cases arise as flows:

Most federal employees have three alternative avenues for pursuing claims of unfair or illegal treatment in the workplace. However, they cannot complain about the same issue both through the grievance process and in a statutory process such as the EEO or MSPB -- electing one forum operates as a waiver of the other. 5 U.S.C. § 7121(d); 29 C.F.R. 1614.301(a).

1. *The Grievance/Arbitration Route:* The Courts have recognized that "[t]he negotiated grievance procedure is much simpler" than most other employee appeals systems. *AFGE Local 2052 v. Reno*, 992 F.2d 331, 333 (D.C. Cir. 1993).

Under the CSRA, the negotiated grievance procedure for an employee covered by a collective bargaining agreement is generally the exclusive avenue for any bargaining unit federal employee to resolve a grievance. 5 U.S.C. § 7121(a). A typical collective bargaining agreement defines a grievance as "a complaint . . . concerning his or her conditions of employment," and may assert a violation of the contract itself or of "any law, rule or regulation affecting conditions of employment." Many contracts also contain broad Equal Employment Opportunity (EEO) obligations which prohibit discrimination on the basis of age, sex, race, religion, physical handicap, color or national origin. In such cases, a claim of illegal action or discrimination can be filed as a grievance (by either the employee or by the Union) and resolved by an arbitrator. Normally, the arbitrator's decision is final and binding, and the case will end there.

However, if the employee is subject to an adverse action or separate statutory rights are involved, such as the right to be free of employment discrimination or of "prohibited personnel practices," such as retaliation, favoritism, and cronyism, the grievant retains the right to request review of the arbitrator's final decision from either the EEOC or the MSPB, if the case could have been filed with that agency in the first instance. See 5 U.S.C. § 7121(d) ("mixed cases"), (e) (adverse actions), (f) (other prohibited personnel practices, whistle-blowing).

2. *The EEOC Route*: In the alternative (but not at the same time), the employee could file an EEO complaint with his or her agency and then seek a

hearing before the EEOC, as set forth in 42 U.S.C. Sec. 2000e-16 and 29 C.F.R.1614, with or without Union assistance. In brief, an employee choosing this route must first seek "EEO counseling" within 45 days of the allegedly discriminatory event, then normally must file a "formal complaint" within 15 days after the end of the counseling period, after which the agency must investigate. After waiting at least six months, the employee may request a hearing before an EEOC administrative judge, after which the judge will issue a tentative decision, which the agency can accept or appeal.

The employee may also choose to appeal an adverse decision in one of two ways – either through an appeal to the EEOC's Office of Federal Operations, which acts as an appellate review body, or by filing a lawsuit in district court, which hears the case *de novo* – as though for the first time. 42 U.S.C. § 20003-16(c); 29 C.F.R. § 1614.401**.** The EEOC process was improved and simplified in 1999, so that an Administrative Judge may now award compensatory damages in addition to back pay, front pay, reinstatement and other "appropriate remedies," even if the plaintiff chooses not to file in court.[1]

3. *The MSPB Route*: The third venue for federal employees to raise claims of unfair treatment, retaliation and/or discrimination claims is as a challenge to an adverse action such as a suspension, reduction in grade, or removal with the Merit

[1] *West v. Gibson*, 527 U.S. 212 (1999). Before passage of the 1991 Civil Rights Act, private and federal employees' compensatory damages for Title VII, the ADA and Rehabilitation Act violations were limited to back pay. The CRA expanded these damages to include full compensatory damages, including pain and suffering, for both federal and private plaintiffs. Revisions to the federal sector appeals process in 1999 also improved case processing times and efficiency and encouraged settlement.

Systems Protection Board. If the employee asserts that the action was taken as a result of discrimination, the case is treated as a “mixed case.” See 5 U.S.C. § 4303 (performance-based actions), 5 U.S.C. § 7512 (actions to promote the efficiency of the service); 5 U.S.C. § 7701 (MSPB jurisdiction). As with the EEOC procedures described above, an employee may challenge such an action through the grievance procedure instead of appealing to the MSPB, but may not do both. 5 C.F.R. 1201.3 (c).

THE MULTIPLE APPEAL PROBLEM

Most of the time, the employee must make a binding choice and can only file one case, in one forum. In other words, they can file "under the statutory procedure or the negotiated procedure but not both." 5 U.S.C. § 7121(d). However, arbitration of discrimination cases and “mixed cases” present additional hurdles.

Arbitrations Involving Discrimination

For example, if the employee selects the grievance/arbitration route for a case which includes a claim of discrimination, his or her appeal route case differs. Rather than proceeding directly into court, the employee must then exhaust a second administrative review by proceeding first to the EEOC. The absurdity of requiring an employee to file a costly and duplicative administrative appeal with the EEOC after he or she has already arbitrated her case was the subject of a court case in *Johnson v. Peterson*, 996 F.2d 397 (D.C. Cir. 1993).

In *Johnson,* AFGE argued that the passage of the CSRA was intended to streamline these layers of appeal. However, the U.S. Attorney's Office was able to convince the U.S. Court of Appeals for the D.C. Circuit that Congress intended to

require employees to exhaust an EEOC appeal *after* completing their arbitration case, *before* they could proceed to court. *Johnson*, 996 F.2d at 399-400, citing 5 U.S.C. § 7121(d). This rule is absurd, expensive and pointless, since the agency is already aware of the EEOC issue and has already litigated the matter once.

Adverse Action Appeals/EEO Charges Involving Discrimination

For a "mixed case" (appeals of removals or suspensions greater than 14 days coupled with a claim of discrimination), the CSRA establishes a special, even more complex procedure. *See* 5 U.S.C. § 7702(a)(1). As noted above, the aggrieved employee must make an initial, binding choice. He may seek relief either under a statutory procedure (MSPB or EEOC) or under the negotiated grievance procedure, but not under both. 5 U.S.C. § 7121(d).

Under the statutory procedure, the employee may first file the complaint with his employing agency which has 120 days to reach a decision. 5 U.S.C. § 7702(a)(2)**.** If the agency decides against the employee, the employee may either appeal to the MSPB or seek direct judicial review. 5 U.S.C. § 7702(a). If an employee appeals to the MSPB, it must reach a decision within 120 days, at the end of which period the employee may either proceed directly to court or seek further administrative review. 5 U.S.C. § 7702(a)(3). An employee who wishes to follow the administrative route may appeal the MSPB's decision to the EEOC which, under the statute, has 30 days to decide whether to hear the case. 5 U.S.C. § 7702(b)(1).

If the EEOC rejects the case or if it accepts the case and agrees with the MSPB's decision, the employee may then proceed to court. 5 U.S.C. § 7702(b)(5)(A). If the EEOC accepts the case but disagrees with the MSPB,

however, it must remand the case to the MSPB for further consideration. 5 U.S.C. §§ 7702(b)(3)(B), (b)(5)(B). Upon reconsidering the case, the MSPB issues an opinion that either agrees with the EEOC or rejects the EEOC's findings. If the MSPB agrees with the EEOC, the employee may seek judicial review. 5 U.S.C. § 7702(c). If the MSPB rejects the EEOC's findings, however, the statute calls for the creation of a *special panel* to make a final decision. 5 U.S.C. § 7702(d)(1). The special panel's final decision is then subject to one final judicial review. 5 U.S.C. § 7702(d)(2)(A).

As with the double appeals in the arbitration-EEOC mixed case noted above, such a tortuous path is both bizarre and inefficient, and benefits neither the employee nor the agency. Nevertheless, in *AFGE Local 2052 v. Reno*, 992 F.2d 331, 333 (D.C. Cir. 1993), which involved a "mixed case" brought under the negotiated grievance procedure and heard by an arbitrator, the U.S. Attorney's Office was once again able to convince the U.S. Court of Appeals for the D.C. Circuit, *over AFGE's objections*, that such an appellant had to file a costly and duplicative administrative appeal, this time with the MSPB, prior to seeking judicial review. The Court criticized "the complex yet ultimately ascertainable procedural scheme that emerges from the language of the CSRA," noting that there are six different administrative stages prior to a final decision in the processing of a mixed case that provide employees with an opportunity to go directly to court with their appeal. *AFGE Local 2052*, 992 F.2d at 336. In the end, the Government's position made it extremely difficult, expensive and time-consuming for employees to navigate this Byzantine system.

CONCLUSION

To rectify the extraordinary delays and procedural confusion which characterize the processing of mixed cases, AFGE recommends that the federal appeals process be simplified and streamlined by permitting employees to choose *a single forum* (MSPB, EEOC, or arbitration) to decide all issues in accordance with established case law. Experience has shown that employees may properly select a single, appropriate forum in which to pursue their discrimination claims for a particular case, and bring to an end the labyrinthine process that currently exists.

Finally, AFGE has attempted to work with both the Department of Homeland Security and the Department of Defense to ensure that their new proposed appeals systems preserve due process and fairness, while simplifying and speeding up the appeals process. In both cases, we were unfortunately forced to obtain court injunctions in order to ensure due process and to preserve employee's ability to seek review from an independent third party, such as an arbitrator or an MSPB or EEOC Administrative Judge. We agree with the courts that it is absolutely critical that any such system remain fair and independent, both in perception and in reality, so that it may continue to serve the essential purpose of safeguarding and protecting the merit system from discrimination and abuse, and so that it retains the trust and confidence of employees, managers and agencies and unions alike.

Mr. Chairman, let me conclude my remarks by emphasizing that the Committee needs to redirect its streamlining efforts: (1) away from any proposal to create a Commission and (2) toward the heart of the confusion -- the backlogs at the EEOC and the overlapping jurisdiction of the MSPB and EEOC, where simple discrimination cases can languish for years, and where employees are forced to file

numerous appeals of the same case. Once an employee and an agency get wrapped up in a mixed case, it may be years before they see the light of day.

Rather than creating yet another Commission to study the problem, this Subcommittee could fix the problem by revisiting the Court's decisions in *Johnson and AFGE Local 2052*. For example, the Committee could revise the law and regulations to expressly eliminate any layer of cross-appeal between arbitration decisions, the EEOC and/or the MSPB, no matter where the case arose. Similarly, employees who elect to file cases with MSPB or EEOC in the first instance should expect finality in their administrative appeals, while retaining the right to seek *de novo* judicial review in appropriate cases.

The FLRA, the MSPB, the OSC, and the arbitration systems, by contrast, are functioning well and should be exempted from any Commission. EEOC backlogs, agency investigations and mixed cases are the three black holes of employee appeals. By contrast, the FLRA, the MSPB, the OSC, and the arbitration systems, by contrast, are functioning well and do not require intervention by this Committee at this time, no do they require “study” by a Commission. There is no need to appoint their Directors to any Commission, nor to tinker with their functioning, except perhaps to allocate more additional funding so that they can continue to process cases and carry out their mandates, especially the FLRA. In particular, AFGE is unaware of any delays in processing time for arbitration cases, except where agencies intentionally delay cases in an effort to game the system. Such situations can easily be resolved by the individual arbitrator assigned to the case, and do not require any action by this Subcommittee or by any Commission.

AFGE thanks the Committee for the opportunity to share our views. Our members look forward to working with both the House and Senate to enact laws that improve protections for federal employees.

This concludes my statement. I will be happy to respond to any questions the members may have for me.